Petition

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No. 81-1136

IN THE

Supreme Court of the United States

October Term, 1981

MILO R. MESSENGER, an individual, and
CONNIE MARIE MESSENGER, his wife,
Petitioners,

vs.

BUCYRUS-ERIE COMPANY, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. Questions Presented for Review

1. Did the United States District Court for the Western District of Pennsylvania commit reversible error in excluding opinion testimony from the Plaintiff, Milo R. Messenger, which testimony is admissible under Federal Rule of Evidence 701, thus requiring the granting of a new trial on the issue of causation?

2. Did the United States Court of Appeals for the Third Circuit err when it failed to reverse the judgment of the trial court and order a new trial on the issue of causation?

II. List of Parties

All parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

1. Milo R. Messenger and Connie Marie Messenger, his wife, were Plaintiffs in the United States District Court for the Western District of Pennsylvania and Appellants in the United States Court of Appeals for the Third Circuit;

2. Bucyrus-Erie Company, a corporation, was the Defendant in the United States District Court for the Western District of Pennsylvania, and the Appellee in the United States Court of Appeals for the Third Circuit.

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Reference to Reports of Opinions Delivered Below

A jury trial was held before the Honorable Rabe F. Marsh, Senior District Judge of the United States District Court for the Western District of Pennsylvania, from September 23 to September 25, 1980. The jury returned a verdict on special interrogatories indicating that the product of Defendant was defective, but that

the defective product was not the proximate cause of Plaintiff's injuries. A judgment was entered on the jury verdict on September 25, 1980. On October 3, 1980, Plaintiffs filed a Motion for a New Trial and Judgment *Non Obstante Veredicto*. The trial court heard argument on Plaintiffs' motion on December 9, 1980, and on December 31, 1980, issued a Memorandum Opinion denying Plaintiffs' motions in their entirety (Appendix A). On appeal by Plaintiffs, the United States Court of Appeals for the Third Circuit at No. 81-1268, after considering the appeal on the briefs only, entered a judgment order affirming the judgment of the District Court (Appendix B). On September 25, 1981, Plaintiffs, the Messengers, filed a Petition for Rehearing *En Banc* with the United States Court of Appeals for the Third Circuit and on October 9, 1981, Court of Appeals issued on Order denying the Petition for Rehearing (Appendix C). This Petition for Certiorari follows.

Statement of Jurisdiction

A final judgment in the form of an affirmance of the Order of the United States District Court for the Western District of Pennsylvania denying Plaintiffs' motions for Judgment *N.O.V.* and for a New Trial was entered by the United States Court of Appeals for the Third Circuit on September 15, 1981. A Petition for Rehearing was filed on September 25, 1981, and was denied on October 9, 1981.

This Honorable Court has jurisdiction to review the judgment as authorized by 28 U.S.C. Section 1254(1) which provides that cases in the court of appeals may be reviewed by this Court "by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." This Petition is timely and in accordance with the Rules of the Supreme Court of the United States.

Rules Involved

Federal Rule of Evidence 602.

"LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses."

Federal Rule of Evidence 701.

"OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

Federal Rule of Evidence 702.

"TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Federal Rule of Evidence 704.

"OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Statement of the Case

To understand fully the error of the trial court in excluding the opinion testimony of Milo R. Messenger, one must be aware that Milo is an individual of limited intelligence and educational background. Throughout the 12 years of his education, he attended special education classes for slow learners. Upon graduation from high school, he enlisted in the Navy. However, he was honorably discharged because of his limited intelligence and inability to pass the educational tests in basic training.

On October 6, 1977, Milo Messenger was an employee of Assad Iron & Metal Company (hereinafter referred to as Assad) located in Brownsville, Pennsylvania. Assad is engaged in the scrap metal business and has a scrap yard for the purpose of buying, selling and processing scrap metal. On the morning of October 6, 1977, Milo Messenger was instructed by his boss to take the tractor portion of a tractor trailer dump truck to the maintenance garage so that the tires could be changed. Before disengaging the tractor from the dump body, Milo had to place wooden blocks under the dollies so that when the dump truck was loaded with scrap iron the dollies would not sink into the mud and become embedded therein. A Bucyrus-Erie truck crane unit had been positioned by another employee of Assad directly behind this dump truck, so that it could be loaded after the tractor portion was taken to the garage. In the course of Milo's obtaining blocks of wood and positioning them under the dump truck, he walked between the parked dump truck and the parked truck crane. After he had positioned the last block and was walking again between the parked dump truck and the parked Bucyrus-Erie truck crane, the truck crane backed up without any warning to him and he was crushed between it and the

dump truck. The truck crane unit had no audible back-up warning device installed on it by Bucyrus-Erie.

Milo Messenger filed suit against Bucyrus-Erie Company, alleging that the truck crane unit which had struck him was defective because it failed to have an audible automatic back-up warning device installed on it. Milo Messenger further contended that the lack of this warning device was the proximate cause of the injuries which he sustained.

A jury trial was held before the Honorable Rabe F. Marsh, Senior District Judge of the United States District Court for the Western District of Pennsylvania, from September 23-25, 1980. The jury returned a verdict indicating that the failure of Bucyrus-Erie to install a back-up buzzer rendered the truck crane sold by it defective. The jury, however, decided the defective truck crane was not the proximate cause of the injuries which plaintiff sustained. A Motion for New Trial and judgment *N.O.V.* was timely made, but was denied by the trial court.

Plaintiffs appealed from the final judgment of the United States District Court for the Western District of Pennsylvania entered pursuant to the jury verdict.

By judgment order without opinion, the United States Court of Appeals for the Third Circuit affirmed the decision of the lower court. A Petition for Rehearing to the United States Court of Appeals for the Third Circuit was denied. This Petition for Writ of Certiorari follows.

The basis for jurisdiction of the federal court of first instance was 28 U.S.C. Section 1332(a) which granted jurisdiction to the United States District Court where the matter in controversy exceeds the sum of $10,000.00 and is between citizens of different states.

Argument and Reasons for Granting the Writ

There are two primary reasons why this Honorable Court should exercise its discretion and grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

First, the United States Court of Appeals for the Third Circuit has, by affirming the decision of the trial court, rendered a decision which is in conflict with decisions of numerous other circuit courts of appeal on precisely the same matter. The United States Court of Appeals for the Third Circuit has also created a conflict between the result of this decision and other decisions rendered by it.

Secondly, the United States Court of Appeals for the Third Circuit has, by affirming the decision of the trial court, decided an important question involving the new Federal Rules of Evidence which has not been, but which should be settled by your Honorable Court, so as to create a clear decisional statement as to the meaning and the import of the new Federal Rules of Evidence.

Prior to trial of the instant action, defense counsel filed a Motion *in Limine* seeking to restrict the testimony of Milo R. Messenger. In particular, the defense requested that Milo Messenger not be permitted to testify at trial concerning his observations or perceptions while walking between the dump truck and the truck crane unit. The defense further sought to prohibit Milo Messenger from offering his opinion based on his observations and perceptions that he would have been able to get out of the way and escape injury if the Bucyrus-Erie truck crane unit had been equipped with an automatic audible back-up warning device. The trial court granted this motion. At trial, Plaintiffs' counsel requested that the trial court permit testimony of this nature by Milo Messenger but those requests were denied.

Milo Messenger would have testified, if permitted, that based on his perceptions and observation of the relative positions of the two (2) vehicles in question; their distance apart; his knowledge that back-up buzzers meant a vehicle was proceeding in reverse; the availability of escape routes from his position between the vehicles; and the fact that he was struck by the outer most portion of the truck crane unit as he walked in that direction, that if there had been an audible back-up warning device on the truck crane unit, he would have been able to get out of the way and avoid the injuries which he sustained.

Specifically, Petitioners submit that the exclusion of lay opinion testimony of Petitioner, Milo R. Messenger, constitutes reversible error because, under Federal Rule of Evidence 701, the proffered testimony of the Petition fits squarely within the provisions of the rule as it was rationally based on Petitioner's own preceptions, and would have been helpful to a clear understanding of the testimony of the facts in issue.

The error in excluding said testimony of the Petitioner, is compounded by the fact that Petitioner, Milo R. Messenger, is of extremely limited intelligence. Your Petitioner, throughout the years of his education, attended special education classes for slow learners, and was, in fact, discharged from the United States Navy because of his limited intelligence, and inability to pass aptitude tests during basic training. By excluding the opinion testimony of such an individual, the trial court took from the Petitioner, perhaps his only method of testifying. In addition, Petitioner's testimony would be eminently helpful to the jury for a clear understanding of the issue of causation.

Rule 701 of the Federal Rules of Evidence was designed to allow lay persons to explain and testify as to their observations in a manner which effectively gets to the truth and will greatly aid a jury. The prohibition of such testimony by the trial court flies in the very face of the letter and spirit of Federal Rule of Evidence 701. Indeed, the opinions which would have been proffered by the Petitioner are precisely the sort of testimony that Rule 701 intended to make available to the finder of fact.

The verdict of the jury in the instant case turned upon the issue of the causation of Petitioner's injuries. There can be no doubt that substantial rights of your Petitioners turned upon a finding of causation by the jury and Milo Messenger's testimony dealt directly with this issue.

In fact, the jury found the Defendant's product to be defective, but found that the defect was not the proximate cause of your Petitioner's injuries.

By excluding the proffered lay opinion testimony of Milo R. Messenger, the trial court denied to the jury the opportunity to hear testimony which was extremely probative on the issue of causation. The jury in the trial court should have been allowed to consider the excluded testimony, as such testimony may well have been the cause of a change in the jury's verdict on the issue of causation.

The Court of Appeals for the Third Circuit by affirming the decision of the trial court, has condoned the error of the trial court in excluding the lay opinion testimony of the plaintiff, when under Federal Rule of Evidence 701 Petitioner's proffered testimony was rationally based on his own preceptions and would have been helpful to a clear understanding of the testimony and the facts in issue.

In addition, the Court of Appeals has condoned an error by the trial court which is not harmless error, in that said error clearly affected the substantial rights of your Petitioner, and was, given the limited intelligence of your Petitioner, perhaps the best and only way in which Petitioner could testify as to the facts in issue.

Rule 701 of the Federal Rules of Evidence is entitled "Opinion Testimony by Lay Witnesses" and provides as follows:

> "If the witness is not testifying as an expert, his testimony in the forms of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the preception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

Your Petitioner would have testified, if permitted, that had the truck crane unit manufactured by the Defendant been equipped with an audible backup warning device, he would have been able to get out of the way and avoid the serious injuries he sustained.

This testimony was based upon the preceptions and observations of the witness as he actually saw the relative positions of the two vehicles in question, their distance apart, and the availability of escape routes from his position between the vehicles. Coupled with this was Petitioner's knowledge that a backup buzzer meant that a vehicle was proceeding in reverse (Tr. 87-90). Thus, it becomes clear that your Petitioner's proffered testimony fits squarely within the first confine of Rule 701. In addition, because of your Petitioner's limited intelligence and learning disabilities, he suffers from an inability to express himself, and Rule 701 becomes of even greater importance because it is the best, or perhaps the only way in which such a person can testify to facts and perceptions. This goes to the very heart and purpose of Rule

701 which, as are all the Federal Rules of Evidence, designed to effectively get to the truth.

The excluded opinion testimony of your Petitioner, is of vital importance to a clear understanding of his testimony in the determination of the fact in issue. As stated *supra*, causation is the key issue in this matter. Although it is indeed true that Plaintiff's expert witness offered testimony as to causation, there can be no doubt that the testimony of the Petitioner himself, the victim, would have greatly aided the jury on the issue of proximate cause. Such testimony by your Petitioner is exactly what Rule 701 intended to include for the consideration of the finder of fact. To prohibit the inclusion of such testimony is to deny the very existence for and the need for a rule such as Federal Rule of Evidence 701. Your Petitioner, better than anyone else, has first hand information concerning how he was injured. Your Petitioner stated that he was aware of backup warning noises on other vehicles and the purpose of such devices. He further stated that new said devices made a loud "beep-beep-beep" sound and that whenever he heard one of these sounds he stayed out of the way. Your Petitioner testified that he had heard such warning devices when other vehicles were backing up. Further, your Petitioner testified that just before he was injured he did not hear or see the truck crane unit backing up and indeed, he testified that he had no indication it was backing up until the truck crane struck him. The opinion testimony of your Petitioner, Milo R. Messenger, was thus, the most probative source of evidence regarding causation, and your Honorable Court, by affirming the exclusion of such evidence, denied the jury the opportunity to hear the type of testimony which Federal Rule of Evidence 701 was designed to make available to them.

By affirming the verdict of the jury in the trial court, the Third Circuit Court of Appeals has put at naught its decision in *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 399 (3d Cir. 1980). In the *Teen-Ed, Inc.*, a retailer sought to introduce testimony of its accountant as to lost profits due to a wrongful termination of a distributorship contract. The accountant's testimony was offered because he had personal knowledge of the balance sheets of the Plaintiff's company. The trial court excluded such evidence, but on appeal, the Third Circuit vacated a judgment and remanded the proceedings for a new trial as to damages because such opinion by a lay witness is permitted by virtue of the provisions of Rule 701. Although the appellee contends that Mr. Messenger had no personal knowledge of how the accident happened, such statement flies in the face of the testimony at trial and in the record which indicates that because there was no backup warning device on the truck crane unit, Mr. Messenger could not hear it, and was thus injured. Indeed, your Petitioner submits that no one has greater personal knowledge of the facts, conditions, and preceptions surrounding the accident itself. Thus, the Third Circuit Court of Appeals by affirming the verdict of the jury, effectively nullified its decision in *Teen-Ed, Inc.*, and also, *Hing Lee v. Gray*, 456 F.2d 1276 (3d Cir. 1972).

Further, by affirming the verdict of the jury in the instant case, the Third Circuit Court of Appeals has created a result inconsistent with that reached by other circuit courts of appeal which have considered the admissibility of evidence under Federal Rule of Evidence 701. Specifically, in *Lang v. Texas and Pacific Railway Company*, 624 F.2d 1275 (5th Cir. 1980), the Fifth Circuit Court of Appeals considered just such a question. *Lang*, was a wrongful death action brought by the widow of a worker killed on the railroad. At trial, the decedent's

foreman was permitted to state his conclusion as to the cause of the decedent's death. Upon judgment in favor of the decedent's widow, the railroad appealed, and the Fifth Circuit held that inclusion of the testimony of the foreman was proper, as said testimony was conducive to a clear understanding of the issue of causation. Despite the Appellee's protestations to the contrary, the views of your Petitioner, Milo R. Messenger, were based on observation of actual conditions, and his preceptions thereof, and your Petitioner should have been permitted to testify as to what would have happened had a backup buzzer been made part of the machine which crushed him.

Similarly, the Eighth Circuit Court of Appeals in *Greenwood Ranches, Inc. v. Skie Construction Company*, 629 F.2d 518 (8th Cir. 1980), held that the inclusion of lay opinion testimony was proper under Federal Rules of Evidence 701 and 702. In *Greenwood, supra*, Plaintiff sued for damages for negligence and breach of contract for failure to supply an irrigation system for the growing of crops. At trial, Plaintiff presented testimony concerning the value of the crop losses for several years. After a verdict for Plaintiff, Defendant appealed, and the Eighth Circuit Court of Appeals indicated that the opinion testimony on the probable value of the crop loss was properly admitted. Specifically, the Court held that:

> "If a witness is not testifying as an expert, his testimony in the form of opinions or inferences need only be rationally based on his preception and helpful to the determination of a fact in issue."

Thus, it can be clearly seen that the letter and spirit of Federal Rule of Evidence 701 was adhered to in that case.

The conclusion of the Third Circuit Court of Appeals that the exclusion if it was error, and Petitioner submits it was, was harmless should be reconsidered by this Court. By excluding the lay opinion testimony of Milo Messenger, the trial court prevented the jury from hearing testimony, from the *best possible source* which was extremely probative on the issue of causation. In addition, the trial court in ruling the exclusion of such evidence left unavailable to the jury important information for their use in considering causation.

There can be no question, that the substantial rights of your Petitioners turned upon the issue of causation and the finding of proximate cause by the jury. Despite the fact that your Petitioner adduced evidence from an expert witness as to the issue of causation, the jury should, at the very least, have been allowed to consider the excluded testimony as such testimony would have come from the best possible source. Further, when one considers the mental handicaps under which your Petitioner exists, the exclusion of such testimony deprived your Petitioner, Milo R. Messenger, of the clearest and best method to convey his testimony to the jury regarding causation.

Your Petitioners respectfully submit that the exclusion of said opinion testimony by the trial court is not only error, but is of such magnitude as to require the grant of a new trial to your Petitioners.

In affirming the decision of the trial court, the Court of Appeals has sanctioned a blatant departure from not only its own decisions, but the decisions of other federal circuit courts of appeal. This departure cries out for an exercise of this Honorable Court's power of supervision.

Conclusion

WHEREFORE, we respectfully request that your Honorable Court grant a Writ of Certiorari to the Petitioners, and reverse the judgment of the Third Circuit Court of Appeals in this case, and remand the case for a trial on the merits of causation alone, thus, granting your Petitioner his full and fair day in court.

Respectfully submitted,

LOUIS M. TARASI, JR.
TARASI & TIGHE
Attorneys for Petitioners

APPENDIX A

Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania Dated December 31, 1980

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

MILO R. MESSENGER and CONNIE M. MESSENGER, his wife,

Plaintiffs,

v.

BUCYRUS-ERIE COMPANY, a corporation,

Defendant.

Civil Action No. 79-1684

In this product liability case, the jury found there was a defect in the truck-crane (hereinafter crane) manufactured by the defendant, Bucyrus-Erie Company, *i.e.*, no back-up buzzer or back-up lights were affixed to the crane; but the jury also found that the defect was not a proximate cause of the accident which caused injuries to the plaintiff, Milo R. Messenger. Judgment was entered in favor of the defendant.

The plaintiffs move for a new trial and judgment *non obstante veredicto.*

Five reasons were assigned for new trial. Only number 5 was presented at oral argument and in plaintiffs' brief:

> "5. The court erred in failing to allow plaintiff to offer opinion evidence by lay witnesses (sic) on the issue of causation."

In our opinion, the motion for new trial should be denied.

Prior to the trial, the defendant presented a Motion *in Limine*[1] requesting an order that the plaintiff "not be allowed to express self-serving speculative opinions such as those contained on pages 56 and 87 of his deposition."[2]

On pages 56 and 57 of his deposition, the plaintiff stated:

> "If it had had a back up light, I wouldn't have got hurt. I would have been under that trailer so fast you wouldn't know what happened."

On page 87, the plaintiff stated:

> "If the crane had a back up bell and a light on it I would have never been hurt today."

Previously, the court had concluded that such evidence was inadmissible.[3]

Before the jury was sworn, counsel for plaintiffs requested the court to permit the plaintiff, Milo R. Messenger, to testify as he had done in his deposition. The court agreed to reconsider its conclusion that the evidence was inadmissible (T. p. 10). Immediately after the plaintiff was sworn as a witness, his counsel requested a side bar conference and again proposed to elicit testimony from the plaintiff concerning "his opinion which we believe is proper under the rules with

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[1] Motion *in Limine* filed September 18, 1980.

[2] *Id.*

[3] Transcript of Proceedings on Motion for Summary Judgment and Motion for Sanctions filed May 28, 1980, page 58.

respect to what he would have done had there been a back-up buzzer or warning device on that hydrocrane truck which struck him on October 6, 1977" (T. p. 37). The court still being of the opinion that the testimony was speculative and self-serving and not opinion evidence as provided for in Rule 701, Federal Rules of Evidence, sustained the objection of defense counsel to the inadmissibility of the proffered evidence.[4]

Rule 701 limits opinion testimony of a lay witness allowing it only when it is rationally based on the perception of the witness. The offer, prior to the witness's testimony, was not based on any of his "perceptions" nor was it "helpful to a clear understanding of his testimony" since the plaintiff had not testified when the offers were made. Even expert testimony is incompetent and may not be admitted into evidence if the opinion is based on mere conjecture. *Hussey v. May Department Stores, Inc.*, 357 A.2d 635, 637 (Pa. Super. 1976).

Thereafter, the plaintiff testified that before he walked between the crane and the trailer, he was aware that the crane was in the process of being backed up to the trailer; that it was stopped three or four feet from the back of the trailer (T. pp. 57, 61); that when he looked through the space between the trailer and the crane, he did not see the crane backing up; that he did not

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[4] Rule 701, Federal Rules of Evidence, provides:

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

hear the crane backing up; that he was not aware of any indication that the crane was backing up; and, that he could not remember seeing James Fisher, the flagman, there at that time (T. p. 72).

He also testified that he had walked between the trailer and the crane twice (T. p. 69). On the second trip, he was pinned between the crane and the truck (T. p. 70).

The excluded testimony of the plaintiff was offered before he testified. It was not based on his perceptions of the factual situation which later appeared from his testimony. At the time it was offered, in the court's opinion, the testimony was a pure conclusion based on speculation, was self-serving, and contained no adequate basis of factual support. The conclusion was not based on evidence of any perceptions of the plaintiff.

The cases cited by the plaintiff were ably analyzed in the defendant's briefs and were shown not to be on point.

Moreover, the plaintiffs' expert witness Dr. Romauldi, expressed an opinion that "the cause of the accident was the absence of an audible warning system on the back of the truck [crane] that would indicate loudly, clearly, and unmistakably signal that the truck [crane] is backing up" (T. pp. 165-166).

The doctor was also of the opinion "within the limits of engineering certainty, that the accident would not have happened had there been a back-up—audible back-up warning signal. I think it is basically logical common sense" (T. pp. 166-167).

Appendix A—Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania Dated December 31, 1980.

Motion for Judgment NOV

This motion was not argued or briefed by plaintiffs.

It appears there is sufficient evidence of record by which the jury could have properly found that the defect in the crane was not a proximate cause of the accident. Whether or not the defect was a proximate cause is a matter within the comprehension and province of the jury.

On cross-examination, the plaintiff testified he knew the crane was to be backed within a few inches of the trailer so that they can properly operate the crane and load it (T. p. 95), and that he never heard backing up bells on the crane (T. p. 97). He was impeached by having admitted in his deposition that the flagman, Fisher, told him to "walk through." If this were found to be a fact, it was the negligence of the flagman which was a proximate cause of the accident.

Also a witness for the defense, Willie Jones, testified that he transported plaintiff to the hospital and discussed the accident with him:

> "Q. Can you tell me what he [plaintiff] said to you about the accident?
>
> A. Well, I asked him how could he let something like that happen, or how did it manage to come about. He said Willie, I really don't know, it all happened so quick, [he] said I was jacking up a trailer and needed some blocks, and went across between the trailer and the crane, and Jim Fisher had been directing Corby [the driver of the crane] . . . .
>
> He said he stopped Corby, and he motioned for me to come on through. And he said, before I realized it

the crane was moving back against me, before I had a chance to get out, it was on me.

Q. That was all that he said?

A. Right."[5]

The cross-examination of the plaintiff; his impeachment; his statement to Willie Jones that the accident was caused by the negligence of the flagman, whose directions the plaintiff followed; and, that plaintiff did not perceive that the crane was moving backwards was sufficient evidence for the jury to find that the defect in the crane was not the proximate cause of the plaintiff's injuries.

Even from plaintiff's direct testimony it could be found that the plaintiff knowingly placed himself in an obviously dangerous position by exiting from the back of the trailer without looking at the crane three or four feet away, which he knew was about to be backed up to within a few inches of the trailer.

In our opinion, there was sufficient evidence upon which the jury could find that the defect in the crane was not a proximate cause of the plaintiff's injuries.

An appropriate order will be entered denying the Motion for New Trial and Judgment *NOV*.

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[5] T. pp. 280-281.

Appendix A—Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania Dated December 31, 1980.

Dated: December 31, 1980

RABE F. MARSH
United States District Judge

cc: Robert N. Isacke, Jr., Esq.
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Appendix A—Memorandum Opinion and Order of the United States District Court for the Western District of Pennsylvania Dated December 31, 1980.

ORDER OF COURT

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

MILO R. MESSENGER and CONNIE M. MESSENGER, his wife,

Plaintiffs,

v.

BUCYRUS-ERIE COMPANY,
a corporation,

Defendant.

Civil Action No. 79-1684

AND NOW, to-wit, this 31st day of December, 1980, after oral argument and after due consideration of the briefs of the parties,

IT IS ORDERED, ADJUDGED AND DECREED that the motions of the plaintiffs for a new trial and judgment *NOV* be and the same hereby are denied.

RABE F. MARSH
United States District Judge

cc: Robert N. Isacke, Jr., Esq.
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APPENDIX B

Judgment Order of the United States Court of Appeals for the Third Circuit Dated September 15, 1981

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 81-1268

MILO R. MESSENGER, an individual, and CONNIE M. MESSENGER, his wife,
Appellants,

v.

BUCYRUS-ERIE COMPANY, a Corporation, and INTERNATIONAL HARVESTER COMPANY, a Corporation.

(D.C. Civil No. 79-1684)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
September 14, 1981
Before: GIBBONS and HUNTER, *Circuit Judges* and GERRY, *District Judge**

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* Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

Appendix B—Judgment Order of the United States Court of Appeals for the Third Circuit Dated September 15, 1981.

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Milo R. Messenger appeals from a judgment in favor of defendant Bucyrus-Erie Company in a products liability case, on a jury verdict in favor of the defendant. He contends a new trial is warranted because the trial court, in violation of Rule 701, Federal Evidence Rules, excluded his lay opinion testimony. If the exclusion was error it was harmless since the opinion was cumulative of expert opinion testimony which was admitted.

Appendix B—Judgment Order of the United States Court of Appeals for the Third Circuit Dated September 15, 1981.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs are taxed in favor of appellee.

BY THE COURT,

JOHN J. GIBBONS
Circuit Judge

Attest:

SALLY MRVOS
Clerk

Dated: Sep 15 1981

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing Dated October 9, 1981

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 81-1268

MILO R. MESSENGER, an individual, and CONNIE M. MESSENGER, his wife,
Appellants,

v.

BUCYRUS-ERIE COMPANY, a Corporation, and INTERNATIONAL HARVESTER COMPANY, a Corporation.

(D.C. Civil No. 79-1684)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the deci-

sion having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

BY THE COURT,

JOHN J. GIBBONS
Judge

Dated: October 9, 1981

Opposition

Office - Supreme Court, U.S.
FILED
JAN 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1136

In the Supreme Court of the United States

October Term, 1980

MILO MESSENGER, an individual, and
CONNIE MARIE MESSENGER, his wife,

Petitioners,

v.

BUCYRUS-ERIE COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUMMARY OF ARGUMENT

After unsuccessful attempts at the trial and appellate court levels, petitioners are seeking review by this court of an evidentiary ruling made by a trial judge. In support of their petition for Writ of Certiorari petitioners allege that the decision of the Court of Appeals upholding the trial judge's ruling conflicts with other decisions of that Court as well as those of other circuits and that their petition presents an important question of federal law.

As will be demonstrated hereinafter, however, the Petition for Writ of Certiorari in this case seeks review of a discretionary ruling by a trial judge which, even if it was in error, was, at worst, harmless error. Moreover, the decision of the Appellate Court affirming the Trial Court conflicts with neither Third Circuit precedent nor that of any other circuit. For these reasons petitioners' Petition for Writ of Certiorari should be denied.

ARGUMENT

Background

In this products liability action, the jury found that a truck crane manufactured by defendant/respondent Bucyrus-Erie Company was defective, but that the defect in the truck crane was not the proximate cause of the plaintiff/petitioner's injuries. At trial, upon respondent's motion *in limine*, the United States District Court for the Western District of Pennsylvania did not permit petitioner Milo R. Messenger to present his self-serving speculation that he would not have sustained injury if the truck crane in question had been equipped with an audible back-up warning device. Petitioners sought to introduce such speculation as lay opinion testimony pursuant to Rule 701 of the Federal Rules of Evidence.

Petitioners thereafter sought a judgment n.o.v. and a new trial before the District Court, appealed to the United States

Court of Appeals for the Third Circuit and requested a rehearing before that Court, all on the ground that the Messenger testimony was improperly excluded from evidence. All of these attempts were unsuccessful. The Trial Court, in denying the Motion for New Trial and Judgment N.O.V., noted (at 507 F. Supp. 41, 44) that despite petitioners' expert testimony concerning causation, there was still sufficient evidence upon which a jury could find that the defect in the truck crane was not the proximate cause of the petitioners' injuries. Moreover, on appeal, the Court of Appeals held the exclusion of the Messenger testimony, even if error, to be harmless error.

Petitioners now appear before this Honorable Court seeking a writ of *certiorari* on two purported grounds. First, petitioners argue that the decision of the Court of Appeals in upholding the exclusion of the Messenger opinion testimony is in conflict with both the prior decisions of the Third Circuit Court and those of the Courts of Appeals of numerous other circuits. Additionally, petitioners assert that the question of whether the Messenger opinion testimony should have been admitted is an important question involving the new Federal Rules of Evidence which has not been decided by this Court.

As will be demonstrated hereinafter, however, four important factors mandate the denial of *certiorari* to petitioners.

1. The Evidentiary Ruling Complained of was a Matter of Trial Court Discretion

Initially, with regard to petitioners' second ground for the granting of *certiorari*, the issue of whether the Messenger testimony should have been excluded is not "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c). Rather, petitioners are seeking this Court's review of a ruling which was a matter of trial court discretion and reviewable only as such. *Randolph v.*

Collectramatic, Inc., 590 F.2d 844 (10th Cir. 1979); *Lewis v. Mellor*, 259 Pa. Super. Ct. 509, 393 A.2d 944 (1978). In *Randolph v. Collectramatic, Inc.*, the Court of Appeals for the Tenth Circuit stated, with regard to the admission of lay opinion evidence:

> The question of whether or not a lay witness is qualified to testify as to any matter of opinion is a preliminary determination within the sound discretion of the trial court whose decision must be upheld unless shown to be clearly erroneous or a clear result of an abuse of judicial discretion. (Citing.) *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 448 (6th Cir. 1974); *Spitzer v. Stitchman*, 278 F.2d 402, 409 (2d Cir. 1960).

590 F.2d at 847. Thus, the decision to exclude the opinion testimony of petitioner Milo R. Messenger in the present case was within the sole discretion of the United States District Court for the Western District of Pennsylvania. Such a matter of Trial Court discretion does not rise to the level of "an important question of federal law which has not been, but should be, settled by this Court." Indeed, inasmuch as a Trial Court's ruling on the admission of lay opinion evidence must be upheld "unless clearly erroneous or an abuse of judicial discretion," *Randolph, supra*, at 847, a decision by this Honorable Court as to the admissibility of Milo R. Messenger's opinion testimony would not provide any settled precedent in the area of the Federal Rules of Evidence.

2. The Exclusion of the Messenger Opinion Testimony, if erroneous, was Harmless Error

In addition to the fact that the order complained of was discretionary in nature, petitioners are seeking this Court's review of a Trial Court's refusal to admit testimony which would, at best, have been cumulative and would have added nothing to the substance of petitioners' Complaint. Thus even if, contrary to the holdings of both the Trial and Appellate

Courts below, the testimony in question was improperly excluded from evidence, such exclusion would be harmless error. Indeed, this conclusion was reached by the Court of Appeals for the Third Circuit in its Judgment Order of September 15, 1981 affirming the judgment of the District Court. There, the Court stated:

> [I]f the exclusion [of the testimony] was error it was harmless since the opinion was cumulative of expert opinion testimony which was admitted.

The testimony which petitioners were unsuccessful in introducing before the Trial Court involved petitioner Milo Messenger's speculation as to what he would have done had the truck crane manufactured by defendant which struck him been equipped with a backup warning buzzer. Significantly, however, Milo Messenger's self-serving speculation concerning causation would have been cumulative of the testimony of petitioners' expert witness, Dr. Romauldi. At Page 165-167 of the Trial Transcript, Dr. Romauldi testified:

> A: My opinion is that given that Mr. Messenger had normal hearing, that the accident, the cause of the accident was the absence of an audible warning system on the back of the truck that would indicate—loudly, clearly and unmistakably, signal that the truck is backing up.
>
> * * *
>
> A: In my opinion, within the limits of engineering certainly, that accident would not have happened had there been a back-up—audible back-up warning signal. I think it is basically logical common sense.

Furthermore, although petitioners were not permitted to introduce the speculations of Milo Messenger, they were, at Page 90 of the Trial Transcript, permitted to introduce the following testimony of Mr. Messenger regarding his actual

experience with machinery equipped with backup warning buzzers:

Q: Also while you were working at ASSAD Iron & Metal you heard these township trucks?

A: Yes.

Q: What did you hear?

A: The "beep, beep, beep" noise on the back of them, when they backed up.

Q: When did you hear that?

A: When they backed up.

Q: What, if anything, did you do when you heard that?

A: Stayed out of their way.

In light of the testimony of Dr. Romauldi and that of petitioner Milo Messenger concerning his past experience with machinery having warning buzzers, it is apparent that the inclusion of Messenger's additional and cumulative testimony concerning causation would have had no impact on the jury's consideration of the case.

Rule 61 of the Federal Rules of Civil Procedure states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Clearly, if testimony is cumulative, its exclusion must be considered harmless. *See Joseph T. Ryerson & Son, Inc. v. H.A. Crane & Brother, Inc.*, 417 F.2d 1263 (3d Cir. 1969), and *Woods v. National Life and Accident Insurance Co.*, 380 F.2d 843 (3d Cir. 1967). Because petitioners' counsel adduced testimony from Mr. Messenger concerning his experience with

backup warning buzzers and from an expert concerning causation, it is obvious that the proferred opinion testimony of Milo Messenger would have been, at best cumulative and, thus, that its exclusion, even if erroneous, was harmless error.

3. The Decision of the Court Below Does Not Conflict With Third Circuit Precedent

Petitioners' Petition for Writ of Certiorari, after discussing the nature of the opinion testimony which Milo R. Messenger would have presented at trial argues that the decision to exclude the Messenger testimony is contradictory to the results in the Third Circuit cases of *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 399 (3d Cir. 1980) and *Hing Lee v. Gray*, 456 F.2d 1276 (3d Cir. 1972). An examination of those cases, however, reveals that the lay opinion testimony admitted in each of them is clearly distinguishable from that sought to be introduced by petitioners herein.

In *Hing Lee v. Gray, supra*, the defendant had stopped his car in the center of a highway, where it was struck from behind by the plaintiff's vehicle. At trial on the issue of the defendant's alleged negligence, defendant testified that he lost control of his car due to a mechanical defect in the steering system. He also testified that he had had a similar mechanical problem with the car on a prior occasion and that repairs had been made. In support of this testimony he offered a repair bill in evidence. On appeal from a verdict for the defendant, the Court of Appeals for the Third Circuit held that the Trial Court properly admitted defendant's testimony with regard to his *prior experience* with his car's steering system. Significantly, the defendant in *Hing Lee* sought only to testify to his perception of an event which had actually occurred: his power steering system difficulties. He did not try to offer testimony about what action he would have taken at the time of the accident had his steering system been any different than it was.

In the instant case, petitioner Messenger was not attempting to give his opinion as to what actually happened based upon his past personal perception, but was attempting to speculate as to what would have happened in a hypothetical situation.

Likewise, the case of *Teen-Ed, Inc. v. Kimball International, Inc., supra*, cited by plaintiffs, is inapposite here. In that breach of contract case, the plaintiff, a retailer, sought to introduce the testimony of its accountant as to the amount of profits it had lost as a result of the wrongful termination of its distributorship contract by the defendant manufacturer.

The District Court refused to allow the plaintiff to introduce the testimony of the accountant on the ground that he had not been qualified as an expert witness and, therefore, was not competent to give opinion evidence.

On appeal, the Court of Appeals for the Third Circuit held that the District Court had erred in refusing to admit the accountant's testimony. The Court noted:

> *The expression of opinions or inferences by a lay witness is permitted because of the qualification in Rule 701(a) that the factual predicate of the testimony be within the witness's perception.* This qualification simply reflects a recognition of the limitation embodied in Fed. R. Evid. 602, that a witness must have "personal knowledge of the matter" in order to testify to it.

620 F.2d at 403 (emphasis added, Footnote omitted). The Court concluded that the accountant's *personal knowledge* of the plaintiff's balance sheets was sufficient to qualify him as an opinion witness with regard to the amount of profits actually lost by the plaintiff during a period covered by the balance sheets.

Unlike the plaintiff in the instant case, the plaintiff in *Teen-Ed* sought only to introduce evidence based on a witness's perception of events which had actually occurred.

4. The Decision of the Court Below Does Not Conflict With the Decisions in Other Circuits on the Same Issue

An examination of the cases in other circuits cited by petitioners also shows those cases to be in complete harmony with the decision of the Third Circuit in the instant case.

In *Lang v. Texas & Pacific Railway Company*, 624 F.2d 1275 (5th Cir. 1980), cited by petitioners, the widow of a railroad switchyard worker brought a wrongful death action against the railroad and was permitted to introduce the testimony of the decedent's foreman that he had observed slippery ground and poor lighting conditions at the scene of the decedent's death and that either of these conditions could have been the possible cause of the decedent's being struck by a group of freight cars.

The Court of Appeals upheld the introduction of the evidence. In so doing, however, it noted that the witness had examined the scene of the accident shortly after it occurred. It is significant, then, that the views of the witness in *Lang* as to the possible causes of the decedent's death were based on the witness's observations of *actual*, as opposed to hypothetical, conditions.

Moreover, it is significant that the witness in *Lang* was permitted only to testify that the slippery ground or the poor lighting could have caused the plaintiff's decedent's death. He did not offer any opinion that one or the other of these conditions actually was the cause—unlike the offer here.

Similarly, the case of *Greenwood Ranches, Inc. v. Skie Construction Co., Inc.*, 629 F.2d 518 (8th Cir. 1980), cited by petitioners offers no contrast to the decision of the Court of Appeals for the Third Circuit in this case. In *Greenwood*, a farm owner sued the supplier of an irrigation system for the damage to his crops caused by the failure of the system. At

trial, the Court refused to allow the plaintiff to testify as to his opinion of the value of the crops which were lost through the failure of the irrigation system.

On appeal, the Court held that, based on his past experience, the plaintiff should have been allowed to testify as to the value of the crops which he had lost. The basis for such testimony clearly was his actual experience with raising of the type of crops in question and his experience in the marketplace in prior years. The testimony would, thus, have been grounded in fact as opposed to mere speculation. Assuredly, such a holding does not contradict the ruling in this case forbidding petitioner Milo Messenger from testifying as to what his reactions would have been in a situation which he had not, as discussed above, previously experienced.

CONCLUSION

Inasmuch as the Petition for Writ of Certiorari of Milo R. Messenger and Connie M. Messenger sets forth no adequate grounds for the granting of *certiorari* by this Honorable Court, and there are several grounds for the denial of such a writ, respondent respectfully requests that that petition be denied and that the costs of these proceedings be assessed upon petitioners.

Respectfully submitted,

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